



COVID-19's Impact on the H-1B Visa Process

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H-1B during COVID-19: the Return To Work

What happened?



Return to what?



What's next?



H-1B Overview:

Key Agencies in the H-1B Process



Department of Labor



**Department of
Homeland Security**

U.S. Citizenship & Immigration Services (USCIS)
Customs & Border Protection (CBP)
Immigration & Customs Enforcement (ICE)



Department of State

H-1B Overview:

Specialty Occupation Requirements

H-1B job

The **job requires at least a bachelor's degree** in a specialty occupation
Employee must have an appropriate US degree or equivalent from abroad

H-1B wages

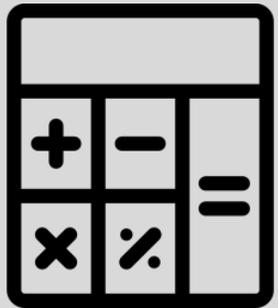
Employer **must pay the "required wage,"** greater of prevailing wage or actual wage

H-1B limit

Maximum period of time is 6 years (up to 3 years at a time), with some options to extend

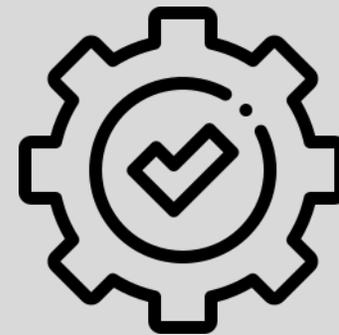
H-1B Overview:

Annual Quota/Cap for New Petitions



Cap numbers

- 20,000 U.S. Master's degree
- 65,000 Bachelor's degree (U.S. or equivalent)
- 6,800 Chile & Singapore (H-1B1)
- 10,500 Australia (E-3)



Cap process

- Annual "lottery" for 85,000 H-1B petitions
- Registration process, new in 2020
- H-1Bs selected in registration lottery: deadline of June 30 to file

H-1B Overview:

Labor Condition Application (LCA) filing and posting



File the LCA

Employer must file an LCA through the DOL's Foreign Labor Application Gateway (FLAG) attesting to the foreign worker's title, wage, work location, duration and more.

20 CFR § 655.730



Post LCA & PAF

Employer must then inform U.S. workers of the intent to hire a foreign worker by sharing required LCA information with them.

20 CFR § 655.734



What happened?



What happened?

Wages

**Reduced
wages / hours**

Furloughs

Benching

Has the definition changed?

Layoffs

Grace period?
Notification?

What happened?

Location

Remote work

Open office?

Closed office?

Work from home

Commuting distance?

Anywhere in the US?

Outside the US?

Partial telecommute

Roving employees

What are roving employees?

Return to what?



Return to what?

The “new normal”

Employees **won't be filling offices** anytime soon, so...

How does this affect your H-1B process?

Any changes to the LCA, notice, and PAF?



Return to what?

What is a “material change?”



If you’ve **changed the H-1B worker’s role** (demoted or promoted), that might be a material change and might require an H-1B amendment



Does **WFH** constitute a material change? That’s a fact-specific question

Return to what?

Reduced Compensation for H-1B Workers

Employer must pay H-1B workers the “required wage”:

the “prevailing wage”
on the LCA

OR

the “actual wage” paid
to similarly employed
U.S. workers (if any)

*Whichever
is greater!*

Wage and Hour Division Fact Sheet No. 62G

Bottom line: if audited, you’re liable for the difference, unless...



Return to what?

Wage Changes due to Economic Situation

Changing economic conditions (or other valid factors) can require that an employer make substantive changes to its actual wage system; the actual wage can go up (e.g., merit increases, cost of living, promotions, etc.) or down (e.g., wage reductions). At the time that the actual wage change occurs, it should be recorded in the public access file (see 20 CFR 655.760(a)(3)). If the actual wage changes, whether higher or lower than the rate of pay on the LCA, ***there is no need for the employer to file a new LCA*** to record it because it is recorded in the public access file.

DOL Field Operations Handbook 71d09(d)(7)



Return to what?

LCA Notice Posting - 3/15/2019 DOL memo

If you're going to post electronic LCAs, you must ... “ensure that all affected workers, including those employed by a third-party, have access to, and are aware of, the electronic notification.”

FIELD ASSISTANCE BULLETIN No. 2019-3



Notification of posting must be **available** to all affected employees



No “**janitor’s closet**” posting



Posting must be **accessible** to all affected employees



3rd party workers must have knowledge and access too!

Return to what?

DOL's FAQs on LCA compliance

FAQ #1 (3/20/2020)

No new LCA needed if WFH is (a) within same area of employment as LCA and (b) no changes to the job

Can repost LCA to reflect the new "worksite" **up to 30 days after moving** worksites (use to be before)

"...employers should also be aware that the **regulations allow employers to provide electronic notice** of an LCA filing"

FAQ #3 (4/9/2020)

No new LCA needed if WFH is not within same area of employment as long as it meets "**short term placement**"

The worksite is in the area of intended employment if it's "**within normal commuting distance**"

Notice is still required - whether you file a new LCA or not!



What's next?



What's next?

Moving forward with H-1Bs and LCAs

H-1B Cap Cases

- Proceeding?
- Pulling the plug?

Compliance Audits

- LCA Postings (paper vs. digital)
- Notification

What's next?

Reduced wages and continued WFH

Wage
Change?

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Continued
Remote
Work?

New LCA
or
H-1B Amend.

What's next?

File your H-1Bs!



**H-1B cap petitions
must be filed by
June 30th!**

Questions we're hearing...

- Can you pay below the LCA wage?
- Below the wage on I-129?
- Below the current prevailing wage?
- Below the wage paid before COVID-19 pandemic?
- What if the amount is different from comparable U.S. co-workers?
- Annual vs. hourly salary - what's the difference?
- Are H-1B amendments needed for furloughed worker?
- Terminated workers returning to work? Before 60 days? After?



Checklist (if not already done)



Review LCA and PAF process in light of the “new normal”



File new LCAs with DOL if:

- H-1B **wages reduced** below PW
- H-1B worker **working remotely indefinitely**
- **Hours reduced** below full-time
- Check PW on July 1 - **if PW lower**, consider new LCA



If across-the-board wage or hour changes due to economic conditions for workers in similar jobs, add memo to the PAF



Withdraw LCA and H-1B for terminated workers



We're in this together!

These are unprecedented times, but we're in this together. Even the government!

“...OFLC will grant extensions of time and deadlines for employers and/or their authorized attorneys or agents affected by the COVID-19 pandemic, including for delays caused by the COVID-19 pandemic and those that occurred as a result of businesses preparing to adjust their normal operations due to the COVID-19 pandemic.”

DOL FAQ Round 1



Thank you



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Diane Butler helps clients successfully navigate the immigration process by providing concise guidance each step along the way. Diane's practice is focused on employment-based immigration for small to large companies, including investors and startups to established multinational companies. She also handles I-9, H-1B, and H-2A compliance reviews, audits, investigations, and litigation. Diane partners with in-house legal counsel, human resources personnel, and recruiters in securing foreign talent and problem-solving to achieve business objectives. She enjoys sharing her insights into the complex, rapidly evolving world of immigration procedure, and troubleshooting cross-border cases.



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I'm the Founder and CEO of LaborLess, an immigration tech startup that automates LCA compliance for H-1B employers and the law firms that support them. Here's the story: after graduating from Brooklyn Law School, I got a job practicing immigration law at a DC area firm. But I quickly realized that I was doing more administrative paperwork than interesting and challenging legal work, particularly around H-1B compliance. "That's just part of the job," everyone told me. But I realized that wasn't why I went to law school, and I wasn't about to spend the next 15 years pushing paper. I also knew that I wasn't the only one who felt this way - I realized no one was automating H-1B visa compliance and that there was a gap in the market, so I quit working as a lawyer, worked in tech for a few years, and eventually launched LaborLess. Today LaborLess helps H-1B employers and immigration law firms across the US and overseas automate their LCA process.

